PROPERTY LAW: 1989-90

VOLUME ONE: INTRODUCTORY, THEORETICAL AND HISTORICAL MATERIALS

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> the plaintiff is entitled to maintain an action for damages for private nuisance, and, if so, it is indisputable that he is also entitled to an injunction against all three defendants.
>
> In my opinion the appeal should be allowed.

NOTES

1. McTiernan J. delivered reasons dismissing the appeal. Leave to appeal to the Judicial Committee of the Privy Council was refused.

2. The view of delictual responsibility expressed by Dixon J. in the second paragraph of his judgment was held to be obsolete in Motherwell v. Motherwell (1976), 73 D.L.R. (3d) 62 (Alta. S.C.A.D.), at p. 68.

3. In Pittsburgh Athletic Co. et all v. KQY Broadcasting Co. (1930), 24 F. Supp. 490 (U.S. Dist. Ct., Penn) the Pittsburgh Pirates obtained an injunction to prevent the defendants from making unauthorized broadcasts of their games from nearby leased premises which overlooked the stadium. The Pirates had given exclusive broadcasting rights to two other radio stations, rights which Schoonmaker J. described as property. He said at p. 492 that KQY's action:

> amounts to unfair competition and is a violation of the property rights of the plaintiffs. For it is our opinion that the Pittsburgh Athletic Company by reason of its creation of the game, its control of the park, and its restriction of the dissemination of news therefrom, has a property right in such news and the right to control the use thereof for a reasonable time following the games.

Victoria Park was distinguished on the grounds that unfair competition was not recognized under English common law.

4. In Canadian Admiral Corporation Ltd. v. Rediffusion Inc., [1954] Exch. 382 the defendant cable company intercepted C.B.C. transmissions of Montreal Alouette games and broadcast them to its subscribers. The court held that "no matter how piratical, the taking by one person of the work of another may be, such taking cannot be an infringement of the rights of the latter unless copyright exists in the work." It then held that such copyright did exist under the provisions of the Copyright Act.

5. For an application of INS v. AP in more highbrow circumstances see Metropolitan Opera Association v. Wagner-Nichols Recording Corp. (1950) 101 N.Y.S. (2d) 483 (N.Y. Supreme Court).

6. In Moorgate Tobacco Co. Ltd. v. Philip Morris ltd. and Another (1985), 56 A.L.R. 193 (H.C. Aust) Dean J. stated that the phrase "unfair competition" has been used in three contexts: as a synonym for the doctrine of passing off, as a generic name to cover the range of legal and equitable causes of action available to protect a trader against the unlawful trading activities of a competitor, and as a cause of action based on the misappropriation of knowledge or information in which one has a quasi-proprietary right. He then stated that no tort involving the third branch was known to Australian law. He noted that the House of Lords had never approved INS v. AP and cited with approval Dixon J.'s statement in Victoria Park that "it is not because the individual has by his efforts put himself in a position to obtain value for what he can give that his right to give it becomes protected by law and so assumes the exclusiveness of property, but because the intangible or incorporeal right he claims falls within a recognized category to which legal or equitable protection attaches." He continued:

> The rejection of a general action for "unfair competition" involves no more than a recognition of the fact that the existence of such an action is inconsistent with the established limits of the traditional and statutory causes of action which are available to a trader in respect of damage caused or threatened by a competitor. Those limits, which define the boundary between the area of legal or equitable restraint and protection and the area of untrammelled competition, increasingly reflect what the responsible Parliament or Parliaments have determined to be the appropriate balance between competing claims and policies. Neither legal principle nor social utility requires or warrants the obliteration of that boundary by the importation of a cause of action whose main characteristic is the scope it allows, under high-sounding generalizations, for judicial indulgence of idiosyncratic notions of what is fair in the market place.

tort that is separate and distinct from any action based on infringement of trademark or copyright, should that exist.

In using the drawings, the defendants were aware of their sources in ex. 18, its use by Mr. Athans commercially, its identification with him, and naïvely decided that they were not obliged to obtain his consent. They knew that the photograph was used as part of his business, and Mr. Connett knew that any arrangement for Mr. Athans' participation or endorsement of the camp would call for compensation to Mr. Athans. The defendant, I.D.L., was aware that commercial negotiations were in progress with Mr. Athans. In the circumstances, the reproduction for commercial advantage of the photograph in the form which it took, was an invasion of Mr. Athans' exclusive right to market his personality. For this he is entitled to compensation. No other injury having been proved, the measure of damages should be the amount he ought reasonably to have received in the market for permission to publish the drawings.

NOTES

1. The trial judge in Krouse v. Chrysler Canada (cited by Henry J. in Athans) found that the plaintiff football player's image was used without authorization to advertise cars. He found that while the mere unauthorized use of a name or likeness was not actionable, there could be recovery if that use impaired the plaintiff's ability to exploit commercially his or her likeness. In coming to this conclusion he reviewed a series of cases on "the right of an individual to his elements of identity". He took this approach rather than embark on an "abstract analysis of property" since property is "an open-ended concept to protect the possession and use of that which has measurable commercial value". He quoted with approval the following passages from Dixon v. Holden (1869), L.R. 7 Eq. 488 per Malins V.C. at pp. 492 and 494:

> What is property? One man has property in lands, another in goods, another in a business, another in skill, another in reputation; and whatever may have the effect of destroying property in any one of these things (even in a man's good name) is, in my opinion, destroying property of a most valuable description.
>
> ....
>
> In the decision I arrive at I beg to be understood as laying down that this Court has jurisdiction to prevent the publication of any letter, advertisement, or other document, which, if permitted to go on, would have the effect of destroying the property of another person, whether that consists of tangible or intangible property, whether it consists of money or reputation. Professional reputation is the means of acquiring wealth, and is the same as wealth itself.

2. In Hallen Laboratories Inc. v. Topps Chewing Gum Inc. (1953), 202 F. (2d) 866 (2nd Cir.) Frank J. said:

> We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture...Whether it be labelled a "property" right is immaterial; for here, as often elsewhere, the tag "property" simply symbolizes the fact that courts enforce a claim which has pecuniary worth.
>
> This right might be called a "right of publicity." For it is common knowledge that many prominent persons (especially actors and ballplayers), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.

3. In Zacchini v. Scripps-Howard Broadcasting Co. (1977) 433 U.S. 562 a television station broadcast without authorization Mr. Zacchini's "human cannonball" act, and he claimed damages for "unlawful appropriation of professional property." A majority of the United States Supreme Court found in his favour, arguing that the media's First Amendment rights must be balanced against broadcasts which "pose a substantial threat to the economic value of [the] performance."

Accordingly, my answer to Q. (b) and the balance of the questions is "no", as the Charter does not apply in this situation.

Thus, the Canadian common and statute law clearly preserves the landowner's right to exclude persons from the property without the prerequisite that there be a reasonable ground for such action. Furthermore, the operator of a race-track is not a person deemed to be engaged in a public calling at common law and thus the Ontario Jockey Club may exclude whomever it wishes from its land. This principle seems to apply equally to the owner of a home as to the owner of a "public area", such as an exhibition, a shopping mall or a race-track.

Judgment accordingly.

NOTES

1. In the Russo case Boland J. cited the Supreme Court of Canada's judgment in Dolphin Delivery. That case involved an injunction issued to prevent picketing on the ground that it was tortious. The Supreme Court held that picketing was within the ambit of freedom of expression and that the Charter applied to the common law. It did not, however, apply where the dispute was a wholly private one not involving government. Per McIntyre J. at p.195: "It will apply to the common law only insofar as the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right or freedom.

McIntrye J. then rejected an argument that a court order was a government act. He stated at p.196:

> While in political science terms it is probably acceptable to treat the courts as one of the three fundamental branches of government, that is, legislative, executive, and judicial, I cannot equate for the purposes of Charter application the order of a court with an element of governmental action. This is not to say that the courts are not bound by the Charter. The courts are, of course, bound by the Charter as they are bound by all law. It is their duty to apply the law, but in doing so they act as neutral arbiters, not as contending parties involved in a dispute. To regard a court order as an element of governmental intervention necessary to invoke the Charter would, it seems to me, widen the scope of Charter application to virtually all private litigation. All cases must end, if carried to completion, with an enforcement order and if the Charter precludes the making of the order, where a Charter right would be infringed, it would seem that all private litigation would be subject to the Charter. In my view, this approach will not provide the answer to the question. A more direct and a more precisely-defined connection between the element of government action and the claim advanced must be present before the Charter applies.

McIntyre J., however, went on to say:

> I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the Charter is far from irrelevant to private litigants whose disputes fall to be decided at common law. But this is different from the proposition that one private party owes a constitutional duty to another, which proposition underlies the purported assertion of Charter causes of action or Charter defences between individuals.

2. In 1984 two members of the Committee for the Commonwealth of Canada attempted to distribute pamphlets in the main concourse of Dorval Airport. They were prevented from doing so by airport authorities, and sought a declaration that the airport's public areas "constitute a public forum where fundamental freedoms can be exercised." In Committee for the Commonwealth of Canada v. The Queen is Right of Canada, (1985), 25 D.L.R. (4th) 260 (F.C. - T.D.) Dube J. reviewed a number of American cases involving freedom of expression in airports and stated shortly:

> It seems plain and obvious to me that the public terminal concourses in our Canadian airports, as well as in American airports, have become contemporary extensions of the streets and public places of yesterday. They are indeed "modern crossroads" for the intercourse of the travelling public. In principle, freedom of expression and communication ought not to be abridged in those public forums. The absolute prohibition imposed by the Dorval authorities upon the rather benign and innocuous activities of the plaintiffs flies in the face of the **Canadian Charter of Rights and Freedoms**.
>
> Of course, freedom of expression in a public forum is not unlimited. It may be circumscribed within reasonable limits for the general comfort and convenience of the travelling public. The proper authorities may draw regulations so as to safeguard the well-being and security of the passengers as well as the efficiency of the transportation functions of an airport. But the airport authorities may not impose a categorical interdiction so as to smother the fundamental freedom of persons to peacefully disseminate their political, religious, or other beliefs in a public place.
>
> For those reasons, the declaration sought by the plaintiffs is granted with costs.

The Crown's appeal was dismissed by a 2-1 margin: see (1987), 36 D.L.R. (4th) 501 (F.C.A.). Pratte J.A. in dissent held that the federal government "has the same rights as any owner with respect to its property". McGuigan and Hugessen JJ.A. both held that there had been a violation of the freedom of expression guarantee and the government could not rely merely on its rights as property owner to justify that violation. However both judges also rejected the view, borrowed from U.S. jurisprudence, that airports constituted public forums.